ONG LIAN SHYANG & ANOR *a*

v.

HOOVER MUTIARA SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR *b*
RAMLY ALI JC
[ORIGINATING PETITION NO: D9-24-205-2000]
12 OCTOBER 2000

CIVIL PROCEDURE: *Affidavits - Affidavit-in-reply - Postponement of case - Failure to apply for extension of time to file affidavit - 14-day mandatory requirement - Rules of the High Court 1980, O. 32 r. 13(2)(b) - Whether affidavit rejected* *c*

CIVIL PROCEDURE: *Affidavits - Affidavit-in-reply - Affidavit-in-reply deposed by 2nd respondent/director on behalf of 1st respondent/company - Lack of authority from 1st respondent - Whether discord between directors entitled 2nd respondent to depose affidavit without authority - Whether 2nd respondent should have resorted to s. 355(3) Companies Act 1965 - Whether affidavit could only be used for his own behalf* *d*

Before the hearing of this case, the petitioners raised two preliminary objections. Firstly, that the affidavit-in-reply of the 2nd respondent dated 26 September 2000 failed to comply with O. 32 r. 13(2)(b) of the Rules of the High Court 1980 ('RHC'). Secondly, that the 2nd respondent was not entitled to reply to the affidavit of the petitioners on behalf of the 1st respondent as the 1st respondent was a separate legal entity. *e* *f*

Held:

[1] When the court granted the postponement on 13 September 2000, the court did indicate that such postponement would not entitle the 2nd respondent to automatically file his affidavit-in-reply beyond time. The 2nd respondent should have applied for an extension of time under O. 3 r. 5(1) RHC to file his affidavit-in-reply dated 26 September 2000. Thus, the filing and service of the said affidavit-in-reply did not comply with the mandatory provisions of O. 32 r. 13(2)(b) RHC and ought to be rejected. *g* *h*

[2] A company is a separate legal entity which can sue and be sued in legal proceedings. The company is a different person altogether from its shareholders and directors. *i*

[2a] The court did appreciate the problem faced by the 1st respondent that in the circumstances it was impossible for both the directors, *ie*, the 1st petitioner and the 2nd respondent, to convene a board of directors meeting and resolve certain matters for the 1st respondent. However, any of the two directors (including the 2nd respondent) might apply to the High Court under s. 355 of the Companies Act 1965 for a necessary order that the board of directors would not be able to handle and resolve. Thus, the 2nd respondent's affidavit-in-reply, if accepted by court, could only be used for his own behalf and not on behalf of the 1st respondent.

[Both preliminary objections allowed; hearing of summons-in-chambers to proceed accordingly.]

Case(s) referred to:
Catherine Lee v. Lee's Air Farming Ltd [1961] AC 12 ***(refd)***
Perbadanan Nasional lnsurans Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 ***(refd)***
Salomon v. Salomon [1897] AC 22 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 355(3)
Rules of the High Court 1980, O. 3 r. 5(1), O. 32 r. 13(2)(b)

For the petitioners - Colin Pereire (MS Wong with him); M/s HH Goh & Co
For the 2nd respondent - Ong Chee Kwan; M/s Lee Ong & Kandiah

Reported by Usha Thiagarajah

JUDGMENT

Ramly Ali JC:

Introduction

Before the hearing of the summon-in-chambers (encl. 4), the petitioners had raised two preliminary objections namely –

i) that the affidavit-in-reply of the 2nd respondent filed in court and served on the plaintiff on 26 September 2000 has failed to comply with O. 32 r. 13(2)(b) of the Rules of the High Court 1980 and thus should not be accepted; and

ii) that the 2nd respondent, being a separate legal entity from the entity of the 1st respondent, is not entitled to reply the affidavit of the petitions on behalf the 1st respondent without proper authority of the 1st respondent.

This grounds of judgment relates to the hearing of the above preliminary objections.

Background Of The Case

The 1st petitioner was at all material times the director and 20% shareholder of the 1st respondent. The 2nd petitioner was only 10% shareholder of the 1st respondent. While the 2nd respondent, was the other director and 70% shareholder of the 1st respondent. There are only two directors of the 1st respondent namely – the 1st petitioner and 2nd respondent. Only 24 August 2000, both the petitioners had filed a petition to this court alleging that the 2nd respondent was conducting the affairs of the 1st respondent in a manner, *inter alia*, that is oppressive and/or amounts to a propensity to oppress; and unfairly discriminates against the petitioners interest as shareholder; and that is unfairly prejudicial to the petitioners interest as shareholders.

Wherefore, the petitioners pray –

i) that the 2nd respondent be ordered to purchase the petitioners shares in the 1st respondent at a fair price, to be assessed

ii) damages and losses suffered including those that will be suffered by the petitioners arising from or as a consequence of the conduct alleged and the 2nd respondent to pay and indemnify the petitioners for all damages and losses so assessed;

iii) alternatively, that the 1st respondent be wound up and that the assets of the company be distributed accordingly to the petitioners and the 2nd respondent, according to their respective shareholdings; and

iv) costs.

On the same date (24 August 2000) the petitioners had also filed in their summon-in-chambers (encl. 4) praying for –

i) that the 1st respondent be restrained whether by itself and/or its agents and/or its servants and/or otherwise from convening and/or taking any steps to convene a board of directors meeting and/or a shareholders meeting:

(a) to appoint any additional director of the 1st respondent;

(b) to change the signatories to the 1st respondent's accounts maintained with the following banks:

i) Account No. 000.00.50.08.654 MYR, ABN Amro Bank Berhad;

ii) Account No. 1088027276, Southern Bank Berhad, at Kuala Lumpur Main Branch; and

iii) Account No. 1008060808, Southern Bank Berhad, at Johor Bahru Branch;

(c) to rescind the board resolutions dated 15 May 2000 until further order;

ii) that the costs of and arising out of this application be borne by the respondents.

The said summon-in-chambers was fixed for first mention on 28 August 2000. On 28 August 2000, counsel for both petitioners and solicitors for the 2nd respondent were present. No one seemed to appear on behalf on the 1st respondent. On that date, counsel for the petitioners informed the court that the summon-in-chambers had been served on the respondents on 25 August 2000. The counsels for the 2nd respondents requested for another date to enable the 2nd respondent, who was overseas at that time to prepare and file this affidavit-in-reply. Thus, the case was fixed for mention on 13 September 2000.

On 13 September 2000, counsel for both petitioners were present. No one appeared for the 1st respondent. A new counsel for the 2nd respondent turned up requesting for postponement on the ground that he had just been engaged by the 2nd respondent the day before and thus require more time to study the case papers and to get his client's instructions in order to prepare and file his affidavit-in-reply.

The counsel for the petitioners objected to the postponement stating that the 14 days' time period to file affidavit-in-reply had expired. The counsel for the petitioners also argued that if at all the case is postponed as requested by the 2nd respondent, it does not mean that the 2nd respondent automatically be allowed to file his affidavit-in-reply after the expiry date. He had to take necessary steps according to law in order to file his affidavit-in-reply. The counsel for the petitioners also asked for cost of the day. The court, in full agreement with the counsels for the petitioners, that the postponement does not mean that the 2nd respondent can automatically be allowed to file his affidavit-in-reply after the 14 days period had lapsed, finally allowed the postponement and cost was ordered againsts the 2nd respondent. The case was then postponed to 28 September 2000 for hearing of the said summon-in-chambers (encl. 4).

Petitioners' Arguments

For the 1st preliminary objection, counsel for the petitioners argued that the 2nd respondents affidavit-in-reply affirmed on 26 September 2000, filed and served on the same date (*ie*, 26 September 2000) does not comply with the requirement under O. 32 r. 13(2)(b) of the Rules of the High Court 1980. The

14 days period provided under the said Rule had lapsed and the 2nd Respondent had not been granted any extension of time to file and serve the said affidavit-in-reply beyond the 14 days period provided under the Rule. Thus, the said affidavit-in-reply should be rejected for the purpose of the said summon-in-chambers.

As for the second preliminary objection the petitioners contended that since the effect of the application in encl. 4 only relates to the 1st respondent and that the 1st respondent is a separate legal entity from that of the 2nd respondent, the 2nd respondent is thus not entitled to reply the affidavit of the petitioners on behalf of the 1st respondent without proper authority of the 1st respondent. The petitioners argued that, being a company, the 1st respondent is a separate legal entity of its own. The 2nd respondent, as one of the directors and 70% shareholder of the 1st respondent is a separate entity and thus cannot depose an affidavit-in-reply on behalf of the 1st respondent without proper authority given by the 1st respondent.

The 2nd Respondent's Arguments

The counsel for the 2nd respondent argued that when the case came up for hearing on 13 September 2000, he had asked for postponement on the ground that he had just been engaged as the new counsel for the 2nd respondent the day before and required more time to study the papers and to get instructions from his client as to enable him to prepare and file his affidavit-in-reply. When the postponement was granted he assumed that it was an order for an extension of time for filing his affidavit-in-reply.

With regard the 2nd preliminary objection, the counsel for the 2nd respondent argued that the 1st respondent being a company cannot act by itself except through an agent. In this case, there are only 3 shareholders of the company at the material times. They are the 1st and 2nd petitioners and the 2nd respondent. At the same time, there are only two directors of the 1st Respondent. They are the 1st petitioners and the 2nd respondent. Under the present scenario when the directors and shareholders could not come to terms, then there's no body to act on behalf of the 1st respondent. The application in encl. 4, even though refers to the 1st respondent but in actual fact, would adversely effect the interest of the 2nd respondent as majority shareholder. Thus the 2nd respondent should be allowed to affirm an affidavit-in-reply for the purpose of the summon-in-chambers.

Findings Of The Court

It is not disputed that when the 2nd respondent filed and served his affidavit-in-reply on 26 September 2000, the 14 days' period prescribed under O. 32 r. 13(2)(b) of the Rules of the High Court 1980 had lapsed. The 2nd

respondent had not made any formal application for extension of time. The 2nd respondent's counsel only requested for postponement when the case came up for hearing on encl. 4 on 13 September 2000 on the grounds that they had just been retained by the 2nd respondent the day before, to take over the conduct of the case from his former counsels. They had just been handed over the relevant papers by the former counsels and thus required more time to study the papers and to take instructions from the 2nd respondent for the purpose of preparing and filing of affidavit-in-reply. There's nothing mentioned about application for extension of time to file the affidavit-in-reply outside the 14 days' period. In granting the postponement on 13 September 2000, the court had indicated its agreement with the counsel for the petitioners that such postponement, if granted, does not mean that the 2nd respondent can or is entitled automatically to file its affidavit-in-reply beyond time. What the counsel for the 2nd respondent should have done, after consulting and getting instructions from his client is to file for an application for extension of time under O. 3 r. 5(1) of the Rules of the High Court, to file the affidavit-in-reply. That had not been done. Instead, the 2nd respondent, straight away filed his affidavit-in-reply on 26 September 2000, *ie*, about one month after the service of the petitioners affidavit on him – far beyond the 14 days' period provided under O. 32 r. 13(2)(b). In this context, I agree with the counsel for the petitioners, that O. 32 r. 13(2)(b) of the Rules of the High Court is a mandatory requirement. In *Perbadanan Nasional lnsurans Sdn Bhd v. Pua Lai Ong* [1996] 3 CLJ 321, Siti Norma Yaakob JCA had clearly stated that the court has no discretion to allow an affidavit-in-reply to be used in proceedings if such affidavit had not complied with the provisions of O. 32 r. 13(2)(b). She went on to say –

> Order 32 rule 13(2)(b) makes it mandatory for such an affidavit-in-reply to be filed and served within 14 days from the time the affidavit that it seeks to reply is received. The word "must" as opposed to "may" is used in the rule, and we interpret that to mean as implying a peremptory mandate as opposed to a mere direction or discretion as the word 'may' implies. We equate the meaning of the word 'must' as that given to the word 'shall', and for that reason the choice of the word 'must' in the rule does not create any discretion or empowers the court to exercise such discretion.

The learned JCA continued –

> We hasten to add that under such circumstances, the defendant may apply for an abridgement of the period required to file the affidavit-in-reply pursuant to Order 3 Rule 5(1) of the Rules of the High Court.

Under such circumstances I am of the opinion that the filing and service of the 2nd respondent's affidavit-in-reply dated 26 September 2000 do not comply with the mandatory provisions of O. 32 r. 13(2)(b) of the Rules of the High Court 1980. On this ground alone, the said affidavit ought to be rejected and excluded for the purpose of the summon-in-chambers (encl. 4). Thus, the 1st preliminary objection of the petitioners is allowed with cost.

Since the petitioners had also raised the 2nd preliminary objection, I will now proceed to deal with the issue despite the fact that the same affidavit-in-reply had been held to be out of time and rejected on the 1st preliminary objection alone.

As I have stated earlier, the 1st respondent in a company incorporated under the companies Act 1965 and the 2nd respondent is at all material times, the director and 70% shareholder of the 1st respondent. It is trite law that a company duly incorporated under the law is a separate legal entity by itself, which can sue and be sued on its own capacity in legal proceedings. The company is, in law a different person altogether from the shareholders and directors. (For authorities on this point: *Salomon v. Salomon* [1897] AC 22; *Catherine Lee v. Lee's Air Farming Ltd* [1961] AC 12)

In our present case, the 2nd respondent being a director and 70% shareholder of the 1st respondent cannot act on behalf of the 1st respondent in this proceeding unless duly authorised by the board of director of the 1st respondent, by way of a resolution. It is not disputed that there was no such authorisation ever given by the 1st respondent. There is no proof whatsoever to show that the 1st respondent, through its board of directors, had ever authorised any body (including the 2nd respondent) to depose any affidavit-in-reply on its behalf.

The counsel for the 2nd respondent, argued that there are only two directors of the 1st respondent at the material times – *ie*, the 1st petitioner and the 2nd respondent. Under the present scenario, they cannot come to terms and cannot sit together in a board meeting. Thus, there's no question of the board of directors of the 1st respondent by resolution to authorise any body to depose any affidavit on its behalf.

I do appreciate the problem faced by the 1st respondent in this aspect. It is impossible for both the directors (1st petitioner and 2nd respondent) to comprise a board of directors and to resolve certain matters for the 1st respondent. However, under such circumstances, I am of the opinion that any of the two directors (including 2nd respondent) may apply to the High Court

under s. 355(3) of the Companies Act 1965, for a necessary order that the board of directors would not be able to handle and resolve.

As such I agree with the counsel for the petitioners that the 2nd respondent's affidavit-in-reply dated 26 September 2000, if accepted by court, could only be used for his own behalf, but not for the 1st respondent. Thus, the petitioners' 2nd preliminary objection is also allowed with cost.

Decision Of The Court

Based on the above, both the preliminary objection of the petitioners are allowed with cost, and the hearing of the summon-in-chambers (encl. 4) to proceed accordingly.